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IN THE

Supreme Court of the United States

OCTOBER TERM, 19__

No. _____

PETE KING, *Petitioner*,

vs.

UNITED BENEFIT FIRE INSURANCE COMPANY, A Corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Pete King, a resident and citizen of the City of Tulsa, Tulsa County, State of Oklahoma, prays that a Writ of Certioari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above case on May 12, 1967.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Oklahoma and the opinion of the Court of Appeals for the Tenth Circuit has not yet been reported. The latter opinion is printed in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was made and entered on May 12, 1967, and a copy is appended to this Petition following the opinion of the Court of Appeals in the appendix. A Petition for rehearing was denied on June 19, 1967. On June 27, 1967, the Tenth Circuit Court entered an order staying the mandate for a period of thirty (30) days pending application to this Court for certiorari which order provides further that if certiorari is perfected during such thirty (30) days, the stay will continue until final disposition by this Court. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Appellant, Pete King, was entitled to a jury trial on the issues formulated by the pleadings in this case as a matter of absolute right by application of existing Oklahoma Constitutional and Case law as opposed to the apparent conflicting federal case law decisions interpreting the right of jury trial in such cases.

2. Whether on this appeal under all the evidence, the Appellant, Pete King, was entitled to a jury trial on the basic issues formulated by the pleadings in the case.

3. Whether it was in the discretion of the trial Court to deny a jury trial in this case, and if so, was that discretion soundly exercised under the evidence, or, whether the trial Court abused its discretion, if any.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. Amendment VII, Constitution of the United States of America:

"In suits at common law, where the value and controversy shall exceed Twenty Dollars ($20.00), the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

II. Rule 38, F.R.C.P.:

"Jury trial of Right.

"(a) Right preserved. The right of trial by jury as declared by the 7th Amendment to the Constitution, or as given by a statute of the United States shall be preserved to the parties inviolate.

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party."

III. Rule 39, F.R.C.P.

"When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless: (2) The Court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the constitution or statutes of the United States."

IV. Article II, Section 19, Constitution of the State of Oklahoma.

"Trial by jury. The right of trial by jury shall be and remain inviolate . . ."

V. Title 12, Oklahoma Statutes Annotated, Section 556.

"Trial of Issues. Issues of law must be tried by the Court unless referred. Issues of fact arising in action for recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived . . ."

STATEMENT OF THE CASE

Petitioner is an individual resident and citizen of the County of Tulsa, State of Oklahoma. The Respondent, United Benefit Fire Insurance Company, is a Nebraska corporation. Only diversity of citizenship vested jurisdiction of this case in the United States District Court for the Northern District of Oklahoma where Respondent here was Plaintiff and the Petitioner was Defendant.

The complaint before the trial Court alleged that the Defendant, Pete King, signed a written contract appointing him agent for United Benefit Fire Insurance Company for the soliciting and writing of bail bonds in Oklahoma. The complaint further alleged that certain bail bonds had been written by Defendant on behalf of Plaintiff pursuant to said written agreement; that certain forfeitures had occurred and that the Defendant was indebted to the Plaintiff in the amount of at least Twenty-two Thousand Six Hundred Seventy-five Dollars and 26/100 ($22,675.26) on account of moneys paid by Plaintiff due to the for-

feiture of bonds written by the Defendant. The Complaint prayed for a mandatory injunction, an accounting and a money judgment for the forfeitures together with the Court costs.

The Defendant filed his answer denying the validity of the written contract alleging that Plaintiff's approval thereon was never forthcoming and said Defendant further denied any indebtedness on said contract. Defendant made a timely written demand for trial by jury pursuant to F.R.C.P.

The trial Court on its own motion set the case for hearing before the Court without a jury and on objection of Defendant to trial without a jury found that there was no jury question since the action was one for an accounting. The trial Court over the objection of the Defendant, forced Defendant to try the case to the Court; both parties having introduced evidence and rested, the Court entered judgment for the Plaintiff in the amount of Twenty-two Thousand Six Hundred Forty-six Dollars and 06/100 ($22,646.06).

The Tenth Circuit Court of Appeals, in its opinion, expressly stated that the denial of a jury trial on the stated grounds that the action was one "for an accounting or injunction" was erroneous, but said Court affirmed the lower Court judgment upon the mistaken application of federal case authority hereinafter cited and did not apply the existing constitutional and statutory law of the State of Oklahoma in deciding the appeal.

REASONS FOR GRANTING THE WRIT

A. The Tenth Circuit Court of Appeals has decided the case at bar on an important constitutional and statutory question in a way which is in direct conflict with applicable Oklahoma Constitutional and Case law.

In the case of *Jackson, et al.* v. *General Finance Corporation,* 253 P. 2d 166 (Okla. 1953), the Supreme Court of the State of Oklahoma in a well reasoned case expressly overruled a long line of cases previously holding that the error in denying a jury trial in an action properly triable by a jury is rendered harmless where the evidence presents no legal defense and under the issues of the case, the Supreme Court of the State of Oklahoma ruled that a litigant does not waive his right to a trial by jury where a jury has been erroneously refused by offering evidence although his evidence shows no legal defense.

In the *Jackson* case, the Supreme Court of the State of Oklahoma construed Article II, Section 19 of the Oklahoma Constitution and interpreted Section 556 of Title 12, Oklahoma Statutes, 1951, in such a way as to vest in a litigant the absolute right to a trial by jury in a case such as is before the Bar of this Court on this appeal.

To the contrary, the Tenth Circuit Court of Appeals in ruling on this question applied the rule as set forth in the case of *Freeman Contractors* v. *Central Surety & Insurance Corporation,* 205 Fed. 2d 607 (8th Circuit 1953) to the effect that if on the evidence submitted there were only questions of law to be resolved or if on the factual

issues raised by the pleadings, a jury verdict in favor of Appellant would have to be set aside because of lack of substantial foundational evidence, any error in refusing a jury trial could constitute harmless error not justifying retrial.

Thus, we can readily see that the Circuit Court in ruling on Appellant King's appeal applied a Circuit Court of Appeals' decision which not only conflicts with the established case law of the State of Oklahoma, but also, we believe conflicts with the law in such cases as decided by this Honorable Court in *Beacon Theaters* v. *Westover*, 359 U. S. 500, 79 S. Ct. 948, 3 L. ed. 2d 988 (1959). *Dairy Queen, Inc.*, v. *Wood*, 369 U. S. 469, 82 S. Ct. 894, 8 L. ed. 44 (1962), *A. M. F. Tuboscope, Inc.*, v. *Cunningham*, 352 Fed. 2d 150 (10th Circuit 1965) which cases hold:

> "If there were material factual issues to be resolved, a jury was demandable as of right despite the characterization of the action as one for an accounting or injunction."

Had the Defendant King sought a Writ of Mandamus against the trial Court, we believe that under the authority of *Beacon Theaters* v. *Westover, supra, Dairy Queen, Inc.*, v. *Wood, supra,* and *A. M. F. Tuboscope, Inc.*, v. *Cunningham, supra,* the trial Court would have been compelled by a writ to grant a jury trial as a matter of right to this Appellant. We further believe that the question involved in this appeal involves a matter of substantive law as opposed to procedural law and that therefore the law of the State of Oklahoma as set forth in *Jackson, et al.*, v. *General Finance Corporation, supra,* should control.

See also: 78 A. L. R. 888 and *Pritchard* v. *Norton*, 106 U.S. 124, 27 L. ed 104, 1 S. Ct. 102.

B. The Tenth Circuit Court of Appeals has departed from the usual course of judicial proceedings by affirming the judgment of the trial Court and in so doing erroneously placed itself in a position of a jury by weighing the conflicting evidence before it so as to call for an exercise of this Court's power of supervision.

As hereinabove set forth, we have shown this Court that the Tenth Circuit Court of Appeals had applied certain Circuit Court of Appeals' rulings which are contrary to the law as established by this Court in *Beacon Theaters* v. *Westover, supra, Dairy Queen, Inc.*, v. *Woods, supra,* and the very recent case of *A. M. F. Tuboscope, Inc.*, v. *Cunningham.* Petitioner believes that this Court should exercise its supervisory powers in order to settle the question of whether or not a party under the circumstances as formulated by the pleadings in this case is entitled to a jury trial as a matter of absolute right and whether or not said party is compelled to proceed to trial in a case which is admittedly a jury case at the peril of having waived his right to a jury trial by presenting evidence. We believe that the decisions of the Supreme Court of the State of Oklahoma and the decisions of this Court should control over Circuit Court of Appeals decisions in a matter of this nature which involves matters of substantive law as opposed to procedural law and that this issue should be settled clearly and unmistakably by this Court.

Under any circumstance, this Court should in the exercise of its supervisory power over the inferior appellant courts, accept jurisdiction of this appeal and require the Tenth Circuit Court of Appeals to apply the law as established by the decisions of this Court as hereinabove set forth, and, if necessary review the record in this case which record will clearly disclose that the appellant Court has undertaken to weigh the conflicting evidence which was before the trial court.

CONCLUSION

The ruling of the Tenth Circuit Court of Appeals is clearly erroneous in that in the first instance it applied federal case decisions instead of the applicable constitutional and case law of the State of Oklahoma as well as the applicable law of this Court in such cases. Secondly, the Tenth Circuit Court of Appeals has very clearly undertaken to weigh the conflicting evidence before the trial court in reaching its decision and has in effect undertaken to be a jury in this case.

There were no compelling reasons for the trial judge to deny Appellant his constitutional and statutory right to a trial by jury. This Court has continuing concern for the manner in which justice is dispensed in the federal appellant courts and this case is therefore one of those cases where the Court of Appeals has so far departed from the settled rules of applicable law, having applied only conflicting Circuit Court of Appeals decisions as opposed to the settled law as prescribed by this Court and

the Supreme Court of the State of Oklahoma, so as to justify a hearing on certiorari, and, the writ should therefore be granted.

Respectfully submitted

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH 1967 TERM

No. 8732

PETE KING, Appellant,

vs.

UNITED BENEFIT FIRE INSURANCE COMPANY,

a corporation, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Paul E. Garrison, for Appellant.

Tom D. Capshaw (Pierce, Mock, Duncan, Couch & Hendrickson with him on the briefs) for Appellee.

Before MURRAH, Chief Judge, HICKEY, Circuit Judge and CHRISTENSEN, District Judge.

CHRISTENSEN, District Judge

The principal problem involved in this diversity case is whether there was prejudicial error in the refusal of the lower court to grant trial by jury or whether the issues relating to the execution of a contract between the parties and any indemnity due thereunder were purely matters of law or of uncontroverted facts allowing summary disposition.

The appellant, Pete King, is a citizen of the State of Oklahoma. The appellee, United Benefit Fire Insurance Company, is a corporation licensed in the State of Ne-

braska to become surety on bail bonds in civil and criminal actions, with its principal place of business in that state. In July, 1960, appellant signed an Executing Agent's Contract appointing him executing agent of the appellee for the soliciting and writing of bail bonds in Oklahoma. He was thereupon issued powers of attorney by the appellee and during the period of August, 1960, to September, 1964, he did in fact write bail bonds wherein appellee was named as surety and which were paid by appellee in the event of forfeiture of bail by the courts.

On June 8, 1965, this action was commenced by the appellee insurance company. The complaint alleged, among other things, that "the defendant has been the agent of the plaintiff for the writing of bail bonds . . . pursuant to an agreement between plaintiff and defendant . . .", that "plaintiff has issued to defendant many powers of attorney to writ bail bonds binding plaintiff", that "according to the terms of the . . . agreement, defendant is required to indemnify plaintiff for all loss incurred as a result of the execution of any bond written by defendant . . . (and) defendant remains indebted to plaintiff in the amount of at least $22,675.26 on account of moneys paid by plaintiff due to the forfeiture of bonds written by the defendant . . ." The complaint prayed for a mandatory injunction restraining defendant from further use of certain bond powers of attorney still in his possession, an order prohibiting defendant from acting as an executing agent of plaintiff, and accounting, and a money judgment for forfeitures and costs paid by defendant. By way of answer to the complaint, defendant denied,

among other things, plaintiff's allegations concerning his indebtedness to plaintiff, and alleged that the written agreement never became legally binding because its validity was conditioned upon plaintiff's approval which was never forthcoming.

Appellant made a timely written demand for trial by jury. Appellee subsequently filed an amendment to the complaint alleging that if the execution of the written agreement were insufficient, it was nonetheless binding upon both parties by ratification.

When the case came on for trial counsel for appellant moved for a continuance both by reason of the illness of his client and in reliance upon his demand for a jury, apparently unavailable at the time. The court denied the motion for a continuance, ruled that there was no jury question, particularly in view of the nature of the action as one for injunction or an accounting, and proceeded to try the case. At the conclusion of the evidence, the court entered judgment for the appellee for $22,646.06 and further ordered the appellant to surrender and deliver to the appellee certain unused powers of attorney. Only the money judgment is in question here.

We cannot say that the refusal to grant the continuance was an abuse of discretion. The motion for a continuance was not made until the morning of the trial, although an unsuccessful effort to notify the opposing party of the intention to so move had been made the preceding day when the illness of the defendant first became known to his counsel. It did appear that the de-

fendant had not notified his own counsel promptly of his illness, and the hard fact was that on the morning of trial the court and the plaintiff's out-of-town counsel and witnesses were present, prepared to go to trial without having been put on notice of the possibility of a continuance. Under such circumstances it would seem that the least the appellant should have done would have been to demonstrate by affidavit, or otherwise, that his testimony at the trial beyond his mere presence would be of such moment as to render denial of the continuance prejudicial to his defense. No such showing was made, nor was the nature of his prospective testimony indicated; and it was not shown that he would or could testify to any facts beyond, or different from, those covered by his deposition which was available for the purposes of the trial. At the close of plaintiff's case, when the defendant's counsel renewed the motion for a continuance so that "he might come into court and make his defense and explain a few of the items that need to be explained in this case", the parties stipulated at the suggestion of the court that all depositions, including that of the defendant, be placed in evidence. No further request was made for a continuance and defendant, as well as the plaintiff, then rested.

The denial of a jury trial on the stated ground that the action was one "for an accounting or injunction" was erroneous in view of Beacon Theatres v. Westover, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959), and Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S. Ct. 894, 8 L. Ed. 44 (1962). See also AMF Tuboscope, Inc. v. Cunningham,

352 F. 2d 150 (10th Cir. 1965). If there were material factual issues to be resolved a jury was demandable as of right despite the characterization of the action as one for an accounting or an injunction.[1]

It is nonetheless contended here by appellee that the determinative facts were so far uncontroverted and the issues to be resolved at the trial were so essentially issues of law as to render the denial of a jury trial not erroneous, or at least not prejudicial.

Trial by jury is a vital and cherished right, rulings with respect to which are subject to exacting scrutiny on appeal. City of Morgantown W. Va. v. Royal Ins. Co., 337 U. S. 254, 69 S. Ct. 1067, 93 L. Ed. 1347, (1949). See also Dairy Queen, Inc. v. Wood, and Beacon Theatres, Inc., v. Westover, supra.

Rule 39(a) F.R.C.P. provides that when trial by jury has been demanded the action shall be designated upon the docket as a jury action and the trial of all issues so demanded shall be by jury in the absence of stipulation or unless "the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United Staes."

It is firmly established that the granting of a motion for summary judgment or directed verdict in an appro-

1 - Plaintiff virtually concedes this in its brief here where it is wryly observed that "originally, this plaintiff was prepared to enthusiastically argue that as a matter of law defendant was not entitled to a jury trial because this is a matter of equitable cognizance . . . (but *Dairy Queen* and *Beacon Theatres*) somewhat reduced plaintiff's enthusiasm for this argument."

priate case does not infringe upon the right to trial by jury. Here, however, no motion for summary judgment had been filed and the case proceeded as one on trial to the court only. It does not appear that a pre-trial conference, usually an opportune time to consider the propriety of a jury demand, had been held. There appeared at the outset factual issues concerning the execution or ratification of the written contract and a dispute concerning the amount of the indemnity to which appellee might be entitled. The depositions or other proof had not then been offered and it was uncertain what other witnesses might be called by plaintiff or whether the plaintiff himself had additional information affecting these issues.

Irrespective of what might be surmised by the court concerning the insufficiency of available proof, we could not approve a practice of proceeding to trial absent a jury in a case in which a jury has been demanded as of apparent right on the pleadings without some record assurance by summary judgment or other pre-trial procedures that there are no jury questions to be resolved. However, a jury was denied here upon the inadvertent impression that in such an "accounting" or "injunction" suit it was not demandable as of right. Under these circumstances it seems appropriate to inquire whether in view of developments of the trial the denial of a jury was in any way prejudicial. If on the evidence submitted there were only questions of law to be resolved, or if on the factual issues raised by the pleadings a jury verdict in favor of appellant would have to be set aside because of lack of substantial foundational evidence, any error in

refusing a jury trial would constitute harmless error not justifying retrial. F.R.C.P. 61, 39 (a)(2); Freeman Contractors v. Central Surety & Ins. Corp., 205 F. 2d 607 (8th Cir. 1953); Leimer v. Wood, 196 F. 2d 828 (8th Cir. 1953); Forster v. Insurance Co. of North America, 139 F. 2d 875 (9th Cir. 1944). Cf. Whitsell v. Alexander, 239 F. 2d 47 (7th Cir. 1956). See also 3 Barron and Holtzoff, Federal Practice & Procedure (Wright Edition) §1354-1, pp. 451-453.[2] But see Jackson v. General Finance Corp., 253 P. 2d 166 (Okl. 1953) and dissenting opinion of Mr. Justice Black in City of Morgantown W. Va. v. Royal Ins. Co., 337 U. S. 254, 69 S. Ct. 1067, 93 L. Ed. 1347 (1949), supra, at 1072 of 69 S. Ct.

The evidence upon which appellee relies in support of his claim for indemnity for losses incurred as a result of the execution of bonds written by the appellant consisted of portions of the appellant's deposition which was read into the record, the testimony of L. S. Cornett, a general agent of the appellee at the time the appellant allegedly became a bondsman for the company, and the testimony of W. R. Davis, who at the time of trial was employed as bond division manager of the appellee. The appellant's case, on the other hand, consisted of the depositions of A. J. Bianchi, vice president of the appellee in charge of bonds, L. S. Cornett, and the appellant.

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2 - " . . . But the mandate of Rule 61 applies even here and the error must be disregarded unless the losing party has been prejudiced by it. . . The Seventh Amendment guarantees the right of jury trial to litigants in the Federal Courts. In view of the constitutional guaranty and the mandatory language of Rule 39, appellate courts will not affirm a wrongful denial of a jury trial unless convinced in the record that the trial judge's conclusion as to the sufficiency of the evidence to take the case to the jury was not the result of a resolution of conflicting testimony."

We have carefully reviewed the record including the testimony of the above witnesses and have concluded that the evidence establishes as a matter of law the binding execution of the agent's contract.[3] It is undisputed that the contract was signed by the appellant and by Cornett; and the record further establishes that the contract was then approved by Y. A. Decker[4] on behalf of the appellee, and that copies of the approved contract were then returned to the signatory parties.[5] Even if one were to conclude otherwise i. e., that a binding execution is not clearly established by the evidence, it is beyond doubt that the agreement was ratified and acted upon by the respective parties[6] and in that manner became binding.

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3 - At page 59 of the record, counsel for the appellant in his cross-examination of Cornett asks "Isn't it true that it is to be approved by one of the officials who would be either the president or a vice president or the secretary and then attested to by the assistant secretary?" Other than this suggestion by counsel, the record raises no substantial issue as to whether the contract was properly executed.

4 - Bianchi testified that Decker joined United Benefit at the time he became associated with the company as vice president in charge of bonds. He said it is "possible" that Y. A. Decker was Assistant Secretary in 1960. At another point he testified that Decker was "authorized" to sign; later that Decker "apparently" signed for United Benefit Fire.

5 - Cornett, speaking of the contract, said that he "sent it to the office of the United Benefit Fire Insurance Company in Chicago, and it was returned to my office signed by one of the Assistant Secretaries of the company, approved by them." He also testified that "she (Decker) usually approved them" and that "she was an officer of the company and we were so informed." King testified that he could have received a copy of the approved contract but that if he did he could not find it.

6 - The appellee isued its powers of attorney to the appellant and they paid or settled forfeitures on bonds written by the appellant. Appellant wrote numerous bail bonds using the appellee's powers of attorney and he submitted regular reports of his activities to the general agent of the appellee. In addition, he forwarded substantial sums of money to be credited to his "buildup" which fund acted as a surety against any possible loss to the company, and he executed a note and mortgage payable to the appellee as further security for bond forfeitures.

See J.D.C. Petroleum Corp. v. Vulcan Steel Tank Corp., 118 F. 2d 713 (10th Cir. 1941).

Applying the binding effect of the contract as a matter of law, the meaning of the contract with reference to the obligation of the appellant to indemnify the appellee against any and all liability or loss incurred as result of the execution of any bond written by the appellant also was a matter of law properly resolved by the court.[7]

In arriving at the amount of money damages, the district court subtracted the amount held by the appellee in the appellant's "buildup fund" from the total amount the appellee had paid on bond forfeitures allegedly executed by the appellant. The appellant's deposition, received in evidence, makes clear that he questioned his liability with respect to only five of those forfeitures.[8] In four of those five instances, appellant admitted that he had written the bond and that a forfeiture had occurred, but he erroneously suggested that the forfeitures were not binding on him because of some lack of notice from

7 - Paragraph 8 of the Executing Agent's Contract reads; "The Executing Agent will indemnify the Company and the Manager and save them and each of them harmless from any and all liability, loss, costs, damages, claims, suits, attorneys' fees and expenses of whatever kind or nature which either may be sustained or incurred as a result of or in connection with the execution of any bond heretofore or hereafter written by or through the Executing Agent, or which they, or either of them, may sustain or incur in making any investigation on account of any such bonds, in defending or prosecuting any action, suit or other proceeding which may be brought in connection herewith, in obtaining or attempting to obtain a release from liability under any such bond, or in locating, extraditing or surrendering the person bailed . . ."

8 - Referred to in the record as exhibits 6, 12, 14, 17 and 18.

appellee[9] or that by reason of equitable considerations he could obtain or was in the process of obtaining remissions. The one instance where the forfeiture was denied involved such an indefinite and unassertive denial on the one hand,[10] and such positive evidence on the other, including the check of the appellee in payment of the forfeiture order, as to raise no substantial issue of fact.

There thus remained in colorable uncertainty only the question of what effect, if any, a judgment would have should the appellee subsequently obtain remissions of amounts already paid on forfeitures. The court's entry of a money judgment based on the contract, while properly for the amount paid on the forfeitures, made no express provision for the reduction of the judgment or of appellant's liability in the event that any amounts were returned to the appellee by reason of future remissions. This is the only possible prejudice in the judgment that we can see. Whether any such remission would be obtained was not susceptible of proof at the trial but depended upon subsequent action by other courts over which neither the court below nor the parties possessed any control. And as a matter of law any remissions of forfeitures covered by appellee's judgment would no doubt

9 - With regard to forfeitures referred to as exhibits 17 and 18, appellant contended that had the appellee given him notice of a default on the bond he could have "worked it out". In response, we would point out that paragraph 16 of the contract requires that the "executing agent will send immediate notice to the Company and/or the Manager of any forfeiture declared on any bonds written by him", but that it is silent as to any reciprocal duty on the part of the Company.

10 - Record, p. 128: Q. Did you have any sort of forfeiture on James P. Jackson? A. I don't know on that one now. You might refresh my memory on that.

be in trust for the benefit of the appellant either as credit against the judgment or, if theretofore paid, for payment to the appellant.

As so understood, the judgment of the trial court is AFFIRMED.

JUDGMENT

Fortieth Day, March Term, Friday, May 12th, 1967.

Before Honorable Alfred P. Murrah, Chief Judge, Honorable John J. Hickey, Circuit Judge, and Honorable A. Sherman Christensen, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said district court in this cause be and the same is hereby affirmed.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 419

PETE KING,
Petitioner,

VERSUS

UNITED BENEFIT FIRE INSURANCE COMPANY,
a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

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In the

Supreme Court of the United States

OCTOBER TERM; 1967

No. 419

PETE KING,
Petitioner,

VERSUS

UNITED BENEFIT FIRE INSURANCE COMPANY,
a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FEDERAL RULES OF CIVIL PROCEDURE AND SUPREME COURT RULES FOR THE DISTRICT COURTS OF OKLAHOMA INVOLVED

1. F.R.C.P. 39(a)(2):

"When trial by jury has been demanded as provided in rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless . . . (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

2. F.R.C.P. 56(a):

"(a) For claimant. A party seeking to recover upon a claim, counter-claim or cross-claim or to obtain a declaratory judgment may, at any time after the expi-

ration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for summary judgment in his favor upon all or any part thereof."

3. Rule No. 13 of the Supreme Court Rules for the District Courts of Oklahoma:

"Judgment where facts not controverted.

"A party may move for judgment in his favor where the deposition, admission, answers to interrogatories and affidavits on file show that there is no substantial controversy as to any material fact. The adverse party may file affidavits or other materials in opposition to the motion. The affidavits which are filed by either party shall be made on personal knowledge, shall show that the affiant is competent to testify as to the matters stated therein and shall set forth facts that would be admissible in evidence. The court shall render judgment if it appears that there is no substantial controversy as to any material fact and that any party is entitled to judgment as a matter of law. If the court finds that there is no substantial controversy as to certain facts or issues, it shall make an order specifying the facts or issues which are not in controversy and direct that the action proceed for a determination of the other facts or issues.

"Notice shall be given to the adverse parties of the filing of a motion for judgment under this rule. The filing of such a motion shall not delay or extend the time to answer, reply or file other proceedings or papers in the case and it shall not delay the pre-trial conference, the trial or other proceedings in the case. If such a motion is made after the case is at issue, the hearing on the motion and the pre-trial may, in the discretion of the court, be held at one time. Adopted March 15, 1965."

QUESTION PRESENTED

Whether it is error to grant summary disposition of a case where there is no issue of fact.

STATEMENT OF CASE

This is a diversity case wherein the respondent was plaintiff. It is a suit on a contract wherein petitioner agreed to indemnify respondent for forfeitures on bonds written by petitioner for which respondent might become liable.

After the suit was filed depositions were taken wherein petitioner admitted that he executed the contract and that the respondent paid forfeitures on some of the petitioner's bonds. Petitioner admitted that he sent reports to respondent, that respondent paid forfeitures and the petitioner gave the respondent a mortgage on certain real property to secure the losses on some of the forfeitures. The petitioner admitted that he had paid to respondent over $6,000.00 in a build-up fund which served to secure the respondent in part from losses on forfeitures.

The petitioner admitted that the respondent had properly paid the bulk of the forfeitures which were the subject of this suit.

In the pleadings the petitioner denied that the respondent ever executed the contract. On the day of trial the trial judge asked petitioner's attorney what the jury question was. He said it was on the acceptance of the contract by the respondent (who had taken a mortgage from the petitioner to secure some of the forfeitures). Respondent said that if the court found that the question of execution of the contract presented a jury question then

the respondent would proceed on the theory of ratification and acceptance of the contract which respondent had previously pleaded. The trial court found for the respondent.

In the journal entry drawn by the counsel for respondent it was recited that this was a suit for accounting.

On appeal the United States Court of Appeals for the Tenth Circuit stated that the question was:

> ". . . whether the issues relating to the execution of a contract between the parties and any indemnity due thereunder were purely matters of law or of uncontroverted facts . . ."

In affirming the case the Circuit Court apparently held there were none.

ARGUMENT

The United States Court of Appeals for the Tenth Circuit decided that there were no material, substantial or controverted facts and therefore no reason for a jury trial. Such a finding does not raise a question sufficient to make the granting of a writ of certiorari appropriate. Can there be any doubt that summary disposition in the absence of issues of fact is proper?

F.R.C.P. 39(a)(2):

> "When trial by jury has been demanded as provided in Rule 38, that action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury unless . . . (2) *the court upon motion or of its own initiative finds that a right of trial by jury of some or all of these issues does not exist* under the constitution or statutes of the United States." (Emphasis added)

It appears that the petitioner is arguing that the right to jury trial is determined conclusively by the pleadings. Obviously, the petitioner cannot contend this is the rule in federal court in view of the provisions of F.R.C.P. 39(a) (2) and Rule 56 which provide for summary judgment.

Petitioner cleverly tries to circumvent Rules 39 and 56 by arguing that Oklahoma procedure prescribes that the right to a jury trial is determined by the pleadings. In support of this contention he cites *Jackson, et al.* v. *General Finance Corporation,* 235 P.2d 166 (Okla. 1953). Petitioner overlooks the fact that since this case was decided in 1953, Oklahoma has established summary procedures. 12 O.S.A. (Supp.) Rule 13 of the Supreme Court Rules for the District Courts of Oklahoma. It follows that it is no longer the rule in Oklahoma that the pleadings are determinative of the right to a jury trial.

Even if it were the Oklahoma rule that pleadings determine the right to a jury trial, federal procedure would determine the right to a jury trial. *Simler* v. *Conner,* 372 U.S. 221, 9 L.Ed.2d 691, 83 S.Ct. 609 (1963).

CONCLUSION

The Petition for Writ of Certiorari should be denied because the United States Court of Appeals for the Tenth Circuit simply decided that there were no factual issues sufficient to take the case to a jury. Hence, the Circuit Court of Appeals for the Tenth Circuit did not:

1. Render a decision in conflict with the decision of another court of appeals on the same matter;

2. Decide an important state or territorial question in a way in conflict with applicable state or territorial law;

3. Did not decided an important question of federal law which has not been, but should be, settled by this court;

4. Decide a federal question in a way in conflict with applicable decisions by this court;

5. Depart from the accepted and usual course of judicial proceedings, or so far sanction such a departure by a lower court, as to call for an exercise of this court's power of supervision.

WHEREFORE, the respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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